THE ROLE OF THE PROSECUTION AT SENTENCING IN THE AFTERMATH OF PEOPLE (DPP) v Z (2014)

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The morning after St. Patrick's Day might not normally be associated with creative innovation, whatever about disruptive innovation, but the judges who sat on the Court of Criminal Appeal on March 18, 2014 showed that they were no ordinary mortals in this regard. The three judgments they delivered that day in *Fitzgibbon*,[1] *Ryan*[2] and *Z*[3] collectively represent one of the most important sentencing developments in the history of the State. This paper is mainly concerned with the views expressed by the court in *Z* on the role of the prosecution at sentencing hearings, but we must begin with a brief consideration of the guidelines established in *Fitzgibbon* and *Ryan* because of their relevance to our main topic. In *Tiernan*,[4] decided in 1988, the Supreme Court had firmly rejected an invitation to establish sentencing guidelines (for rape in that particular case), saying that it would not inappropriate for an appeal court "to appear to be laying down any standardisation or tariff of penalty for cases." However, in *Ryan* the Court of Criminal Appeal chose (rightly, I would suggest) to interpret this statement as permitting guidance to be given on appropriate sentence *ranges* for certain offences, with due allowance made for any exceptional circumstances arising in particular cases. The court also rightly identified senior criminal appeal courts as having a dual function: the review of specific sentencing decisions and the elaboration of general principles, including sentencing guidance. In other words, such a court should be forum of principle as well as a decision-making tribunal.

The offences in *Ryan* were possession of a firearm and possession of ammunition in suspicious circumstances contrary to s. 27A of the Firearms Act 1964.[5] Each offence carries a maximum sentence of 14 years' imprisonment as well as a presumptive minimum of five years' imprisonment on a first conviction. Having considered ten previous sentence appeal decisions for similar offences, the court indicated the principal factors to be considered when sentencing for a s. 27A offence. It then indicated three sentence ranges: (1) five to seven years; (2) seven to 10 years; and (3) 10 to 14 years. These were expressed to be the appropriate ranges before credit is given for any mitigating factors. Later in its judgment, the court said:

> "… there may be cases where there is a realistic prospect of rehabilitation connected with the accused engaging in educational or training facilities while in

[1] [2014] IECCA 12, [2014] 2 I.L.R.M. 116.

[2] [2014] IECCA 11, [2014] 2 I.L.R.M. 98.

[3] [2014] IECCA 13, [2014] 2 I.L.R.M. 132.

[4] [1988] I.R. 250.

[5] As substituted by Criminal Justice Act 2006, s.59 and amended by Criminal Justice Act 2007, s. 38.

> prison. In an appropriate case, it may well be open to a sentencing judge to take such factors into account by fashioning a sentence which provides the prospect of a partial suspension of sentence which is conditional on the relevant accused engaging in a satisfactory way with such facilities. However, how such a sentence is to be fashioned in an appropriate case is a matter to be addressed in detail when such a case comes for consideration."[6]

This suggests some support for the idea of a reviewable sentence, meaning that suspension at a particular point during the currency of a sentence would be contingent on the offender having engaged with training or therapeutic services while in prison. In *Finn*,[7] the Supreme Court had held that such sentences were undesirable, though it did not go so far as to outlaw them completely, and they are of course available by statute for certain drug offenders.[8]

In *Fitzgibbon*, the appellant pleaded guilty to a charge of causing serious harm contrary to s. 4 of the Non-Fatal Offences Against the Person Act 1997, an offence which carries a maximum sentence of life imprisonment. He had been sentenced to 15 years' imprisonment with the last three years suspended. The Court of Criminal Appeal reviewed sentences which it had upheld or varied in about a half-dozen earlier cases for similar offences and again proceeded to indicate three sentence ranges: (1) two to four years; (2) four to seven-and-a-half years; and (3) seven-and-a-half to 12 years. These were expressed to be the appropriate ranges in the absence of unusual factors, and the court further acknowledged that, at the other end of the spectrum, there might be cases meriting sentences in excess of 12 years, bearing in mind that the maximum sentence for this offence is life imprisonment. The court in *Fitzgibbon* also addressed in passing one of the more intractable problems of the entire criminal law and that is the relationship between intention and consequences in the punishment of offences. Should an offender's deserved punishment be measured by reference to what the offender intended or foresaw when committing the offence, or should the harm actually caused, whether foreseen or not, be taken into account when determining deserved punishment.?[9] This question has particular salience in manslaughter and serious assault cases. In *Fitzgibbon*, the Court of Criminal Appeal said:

> "… the primary focus must always be on the actions of the guilty party… To a significant extent those who commit significant assaults take a chance on the consequences. However, there will always be cases where the unfortunate consequences of an assault are wholly disproportionate to the severity of the relevant assault and, thus, the blameworthiness of the guilty party. For those, or other unusual reasons, there will always be cases where, even without significant

6 [2014] 2 I.L.R.M. 98 at 112.

7 [2001] 2 I.R. 25, [2001] 2 I.L.R.M. 211.

8 Misuse of Drugs Act 1977, s. 27(3J) and (3K) as substituted by Criminal Justice Act 2007, s. 33.

9 For a review of the competing arguments, see Westen, "Why criminal harms matter: Plato's abiding insight in the *Laws*" (2007) 1 *Criminal Law and Philosophy* 307.

> mitigation, and notwithstanding the serious consequences of the relevant assault, a non-custodial would still be the appropriate starting point."[10]

For present purposes, however, *Ryan* and *Fitzgibbon* are most significant for having introduced guidelines in the form of recommended sentencing ranges with scope for departure whenever the special circumstances of a case so demand. This was an unheralded development which came about principally, it would seem, because counsel for the parties had helpfully furnished the court with details of earlier cases of a similar nature. It bears some similarity to a development which occurred in England exactly 40 years earlier in *R v Willis*[11] where the Court of Criminal Appeal provided a similar guideline in a case involving what we would now call child sexual abuse. There the court indicated a sentence range of three to five years, largely because the judge who granted leave had indicated that it would be useful to have guidelines for the offence in question. *Willis* is a short judgment that cites no previous authorities whatever. However, over the next 30 years, beginning in earnest with *R v Aramah*[12] (which dealt with drug offences), the Court of Appeal developed a very substantial body of guideline case law.[13] Following the establishment of the Sentencing Guidelines Council under the Criminal Justice Act 2003 and the present Sentencing Council under the Coroners and Justice Act 2009, the formulation of guidelines was largely taken out of the hands of the courts which were henceforth confined to applying guidelines created by the Council, where such guidelines existed.[14]

There is, however, one interesting difference between the English and Irish experience. When the Court of Appeal decided *Willis*, it was getting into its stride as a criminal appeal court. In 1966, the Court of Criminal Appeal had been abolished and its jurisdiction transferred to the Court of Appeal of which there would henceforth be criminal and civil divisions. Here in Ireland, *Ryan* and *Fitzgibbon* (and *Z*) were decided just as the Court of Criminal Appeal was about to go out of existence. Of all the judges who took part in those three decisions, only one (Judge Birmingham) will be a member of the new Court of Appeal which, from now on, will deal with all criminal appeals from Circuit, Central Criminal and Special Criminal Courts. If, therefore, today I were to send a goodwill message to the newly-appointed members of the Court of Appeal, I would include the following:

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10 [2014] 2 I.L.R.M. 116 at 126.

11 (1974) 60 Cr. App. R. 146.

12 (1983) 76 Cr. App. R. 190, (1982) 4 Cr. App. R. (S.) 407.

13 This case law was reproduced in *Current Sentencing Practice,* initially edited by David Thomas. A leading example of a guideline judgment from this era would be *R v Billam* (1986) 8 Cr. App. R. (S.) 48 on sentencing for rape.

14 For a detailed analysis of guidelines operating in England and elsewhere, see Ashworth and Roberts (eds), *Sentencing Guidelines: Exploring the English Model* (Oxford University Press, 2013).

- They should continue with the practice of delivering guideline judgments as this is probably the best way of bringing coherence and consistency of approach to sentencing generally.

- They should do so only where a suitable opportunity presents itself and should give advance notice to the parties when they consider a particular case to be a suitable one for that purpose. This will allow counsel for both sides to make broader submissions than might be necessary or appropriate if the appeal were confined to the facts of the particular case. Although it is not a matter for the court, it would be only fair if, in these circumstances, there was an increase in the fees payable in guideline cases because of the additional work involved. After all, such cases are likely to be few and far between.

- Existing appeal court judgments are seldom an adequate basis for constructing sentencing benchmarks or ranges. Granted, since the introduction of prosecution appeals against sentence, the range of cases coming before the Court of Criminal Appeal has expanded quite significantly and is no longer confined to those in which heavy sentences were imposed. In fact, a considerable number of the firearms cases coming before the Court in recent years have resulted from prosecution appeals. Nonetheless in a jurisdiction of this size, the number of sentence appeals for most offences are likely to be fairly small. Therefore the court should endeavour to identify trends in trial court sentencing practice as well as appeal practice.[15]

- The court might make more use of comparative material from other jurisdictions which is often very useful in terms of identifying the factors that are relevant in assessing the seriousness of an offence and other factors which may be aggravating or mitigating for the purpose of sentence. In fact, the definitive guidelines and background documents published by the English Sentencing Council can be particularly useful for this purpose.

- The court may wish to commission some research of its own from judicial assistants or others, but where it does so it would be useful if the fruits of that research were provided to counsel for the parties *before* the sentencing hearing as that would help to promote debate and deliberation at the hearing itself.

- Finally, the court, when delivering guideline judgments, might devote particular attention to the principle that a term of imprisonment should be no longer than is necessary in light of whatever penal objective a court is seeking to advance. Doubtless, regard must always be had to the maximum term specified by statute

[15] For further discussion, see O'Malley, *Sentencing: Towards a Coherent System* (Dubliin: Round Hall, 2011).

> but a court inclined to impose or recommend, say, a ten-year sentence should always ask itself if there is anything that can be achieved by a ten-year sentence that cannot be achieved by a five year sentence. We often hear members of the public criticising a sentence of, say, five years as being too short and saying that at least ten years should have been imposed. Yet, they never specify what exactly is right about a sentence of 3,650 days but wrong about a sentence of 1,825 days. Imprisonment is likely to remain a scarce resource for the foreseeable future so it is important that terms imposed or recommended should be carefully selected having regard to the principles of proportionality and parsimony.

The development of sentencing guidelines, like the development of sentencing information systems, will always be a work in progress. Indeed the court of Criminal Appeal in *Ryan* and *Fitzgibbon* accepted that refinements to the recommended ranges might have to be made as further information comes to light. As the English experience shows, it can take many years to develop guidelines covering the entire spectrum of commonly-prosecuted offences. Existing guidelines may also be subject to change over time because of statutory amendments, the courts' own experience of dealing with cases to which guidelines apply and, importantly, changes in ideas about the purposes of criminal punishment and the principles by which it should be guided.[16] However, the need for some kind of sentencing guidance cannot be gainsaid. One need only consider sentencing practice for s. 15A drug offences which can best be described as chaotic, and this largely because the Court of Criminal Appeal has seldom paid much attention to its own case law when dealing with individual appeals.

THE PROSECUTION ROLE

Traditionally, the prosecution played no role of any consequence at sentencing.[17] But it is now accepted, especially since the introduction of prosecution appeals against sentence, that prosecution counsel must participate to some extent in the sentencing hearing. What form that participation should take is the more difficult question and it explains why the Court of Criminal Appeal judgment in *Z* was a cause of some concern. The problem essentially derived from the following paragraph in the judgment:

> "2.7 In this Court's view, there is now an obligation on the prosecution to draw to the attention of a sentencing judge any guidance, whether arising from an analysis carried out by this Court or from ISIS or otherwise, which touches on the ranges or bands of sentences which may be considered appropriate to any offence under consideration and the factors which are properly, at least in ordinary cases, to be taken into account. In many cases,

[16] For instance, in 2006 the Sentencing Guidelines Council published a definitive guideline on sentencing for robbery. In October 2014, its successor, the Sentencing Council, opened consultations on a new more extensive set of guidelines on sentencing for robbery.

[17] *People (DPP) v Heeney* [2001] 1 I.R. 736.

> this should not impose any significant burden on the prosecution for the sources ought be easily recognised. In addition, it seems to this Court that it is incumbent on the prosecution to suggest, where such guidance is available, where the offence under consideration fits into the scheme of sentencing identified and why that is said to be the case. Finally, the prosecution should indicate the extent to which it is accepted that factors urged in mitigation by the defence are appropriate and give at least a broad indication of the adjustment, if any, in the overall sentence which it is accepted ought to be considered appropriate in the light of such mitigation."

The court reasoned that it was unfair that the prosecution should be allowed to appeal against undue leniency of sentence if it has not suggested to the trial judge the sentence or range of sentence appropriate in the particular case. It said that such an approach should be conducive to generating consistency of sentencing, although it acknowledged that it might not be necessary to make such a submission where it was known the judge was already well aware of the appropriate parameters for the offence in question. It also said that the judge was not, of course, bound by any such submissions. As regards mitigation, the Court said:

> "Obviously, in addition, it is also open to defence counsel to put forward any matters which are urged in mitigation and to indicate the effect that such matters ought have on sentence subject, of course, again, to the entitlement of counsel for the DPP to comment on any such mitigating factors and the weight to be attached to them."

Following the delivery of this judgment, the Director of Public Prosecutions decided to make further submissions to the Court in regard to these aspects of it. The opportunity to do so arose at the adjourned hearing in *Fitzgibbon* where the Court was to hear further submissions as to the appropriate sentence. On that occasion, the Court agreed to hear from counsel for the prosecution on the general question about the prosecution role raised by *Z.* It was directly relevant at that point because the Court itself was now, in effect, the sentencing court in *Fitzgibbon.* Essentially, what was being sought by the Director on that occasion was clarification as to what kind of submissions the Court expected that prosecution counsel should henceforth make at sentencing hearings, including what might be expected from the prosecution in terms of challenging grounds of mitigation put forward by the defence.

The Court helpfully delivered a further judgment in *Fitzgibbon* in which it offered some clarification on these matters.[18] It re-affirmed first that the selection of sentence is a judicial task and that there was no question of any party offering guidance to the judge as to what the sentence in any case should be. However, it said that prosecution counsel

[18] *People (DPP) v Fitzgibbon (No.2)* [2014] IECCA 25.

should be expected to offer *assistance* to the judge in relation to sentencing. More specifically, it said that

> "…it is for the DPP to bring to the attention of a sentencing judge any guidance on sentence which has been given either by this Court or from other relevant sources… and to make submissions as to where, in light of that guidance, the case in question falls."

As to the content of such submissions, the court said where there is information available on the range of sentences typically imposed for particular offences, prosecution should bring this to the court's attention where relevant. This would include guideline ranges such as those identified in *Fitzgibbon* itself and *Ryan* but also information derived from "any reputable analysis of the sentences typically imposed by sentencing judges for the offence in question." The court clearly had in mind sources such as ISIS, the Irish Sentencing Information System which has some such information. It also seems to comprehend information about sentences imposed in comparable cases, based perhaps on Court of Criminal Appeal decisions such as those which had been brought to the court's own attention in *Fitzgibbon* and *Ryan.*

Where there is no such guidance available, prosecuting counsel should not suggest any range of sentence, as this would involve straying into the judicial domain. As already suggested, sentence ranges for a broader range of offences may be established in the years ahead, but meanwhile trial judges will have to be patient. They cannot expect counsel for either defence or prosecution to recommend sentence ranges where none formally exists. Needless to say, counsel for both sides should be familiar with general principles of sentencing, whether based on legislation or case law, and be prepared to draw the court's attention to these in appropriate cases.

As to the prosecution role in connection with any plea in mitigation put forward in the defendant's favour, the court noted the following existing provisions of the Guidelines for Prosecutors

> "8.17 When the defence advances matters in mitigation which the prosecution can prove to be wrong, and which if accepted are likely to lead the court to proceed on a wrong basis, the prosecutor should first inform the defence that the matter advanced in mitigation is not accepted. If the defence persists it is the prosecutor's duty to invite the court to put the defence on proof of the disputed matter and if necessary to hear the prosecution evidence in rebuttal. Co-operation of convicted persons with law enforcement agencies should be appropriately acknowledged or, as the case may be, disputed at the time of sentencing.
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> 8.18 Where the defence advances matters in mitigation of which the prosecution has not been given prior notice or the truth of which the prosecution is not in a position to judge, the prosecutor should invite the court to insist on the matters in

question being properly proved if the court is to take them into account in mitigation.

…….

8.20 The prosecutor should not seek to persuade the court to impose an improper sentence nor should a sentence of a particular magnitude be advocated. However, the prosecutor should draw the court's attention to any relevant precedent."

The court in *Fitzgibbon (No.2)* said that it did not see any tension between what it had stated in *Z* and the principles expressed in these provisions of the Guidelines. It did, however, go on to say:

> "Where, however, matters are urged in mitigation and where significant weight is sought to be attached to such matters and where, in the view of the DPP, such matters do not bear, in light of the jurisprudence of the courts, any, or the asserted level of, mitigation, then it does seem to this Court that prosecuting counsel should address argument to that effect to the sentencing judge."

What seemed to concern the court in this connection is that, at appeal hearings, and especially prosecution appeals against sentence, counsel for the prosecution sometimes claim that excessive credit was given by the trial judge for certain mitigating factors. The court therefore felt that prosecuting counsel should be obliged to make submissions to the trial judge in this connection as well. The court summed up its view of the relevant law in these terms:

> "The obligation arises either where a matter of some significance is urged in mitigation which the DPP considers is not properly a mitigating factor at all in accordance with the jurisprudence of the courts or where significant weight is urged to be attached on a matter which, for like reasons, the DPP does not consider would warrant significant mitigating weight."

The general tenor of the judgment in *Fitzgibbon (No.2)* suggests that the court did not intend to place a particularly onerous duty on the prosecution in this regard except to the extent that prosecuting counsel should remain alert to any defence submissions made in mitigation. Counsel should be prepared to object in the event that a factor being relied upon should not be treated as mitigation at all or that it should not, in the particular circumstances, deserve much credit. This might arise if, for example, intoxication was put forward as a mitigating factor although it is accepted that it does not normally operate as such. The same would hold true of lack of premeditation which, in the context of violent offences at least, has been treated as the absence of an aggravating factor as opposed to being a mitigating factor in itself. As to the attribution of excessive weight to a mitigating factor, this might arise if, for example, defence counsel were claiming credit for a guilty plea when in fact the plea had not been entered until a very late stage in the proceedings,

perhaps after the trial began, or in circumstances where the defendant had been caught red-handed. Courts have generally accepted that even in these circumstances, some credit may be given for a guilty plea though not as much as would be merited for an early plea or one entered where the defendant might credibly have contested the charge.

MITIGATION

Mitigation can be categorical or individual. Mitigation is categorical when it is extended to offenders because of the category or group to which they belong, on the assumption that they all share certain common characteristics. The best example, if not the only one, is the mitigation given to children on account of the fact, or the assumption, that they have not yet achieved the same level of cognitive or psychosocial development as adults.[19] Otherwise mitigation is almost always individual in the sense that it is awarded following an examination of the particular circumstances of the offence and/or the offender.[20]

The range of mitigating factors recognised in any jurisdiction depends on the fundamental values animating its sentencing system. A strict policy of just deserts requiring that every sentence be commensurate with the gravity of the offence (and that alone) would restrict relevant sentencing factors to those present at the time the offence was committed though, even within that kind of system, some allowance or discount would usually be made for a guilty plea. In Ireland, as in most other common-law countries, courts are not obliged to adhere to any one moral justification for punishment, whether it be just deserts, deterrence, rehabilitation or whatever. They may choose from a menu of options in that regard. In fact, in other countries including Canada and England and Wales, such a menu is provided by statute.[21] However, in this country we adhere strongly to proportionality as the dominant distributive principle of punishment. Proportionality can nevertheless be defined in different ways. As in the case of just deserts as a rationale for punishment, proportionality might require that a sentence should be: (1) proportionate to the gravity of the offence; (2) proportionate to the gravity of the offence and the circumstances of the offender as they existed at the time of the offence; (3) proportionate to the gravity of the offence and the personal circumstances of the offender as they exist at the time of sentence.

The significance of these distinctions can be appreciated by considering factors such as remorse, victim forgiveness, or an illness or disability developed by the offender has since

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19 This is reflected in a trilogy of fairly recent decisions of the United States Supreme Court: *Roper v Simmons* 543 U.S. 551 (2005); *Graham v Florida* 560 U.S. – (2010); *Miller v Alabama* 567 U.S. – (2012).

20 It is only quite recently that the concept of mitigation has begun to receive sustained critical attention. See, for example, Roberts (ed.), *Mitigation and Aggravation at Sentencing* (Cambridge University Press, 2011); Roberts, "Aggravating and mitigating factors: Towards greater consistency of application" [2008] Crim. L.R. 264; Easton, "Dangerous waters: Taking account of impact at sentencing" [2008] Crim. L.R. 105; Piper, Should impact constitute mitigation? Structured sentencing versus mercy" [2007] Crim. L.R. 141.

21 Criminal Justice Act 2003, s. 142 (England and Wales); Canadian Criminal Code s. 718.

the offence was committed. Those who advocate one of the stricter versions of proportionality by confining it to the circumstances that existed at the time of the offence would deny that any of these factors should have any bearing on sentence. As regards remorse, they might treat it as relevant provided there was "immediate repentance" by the offender as soon as he or she committed the offence, but not if it failed to manifest itself until long after that time.[22] They would obviously have no time for other factors such as victim forgiveness which were unconnected with the gravity of the offence as committed.

In Ireland, we have adopted the third version of proportionality mentioned above. A sentence is to be proportionate to the gravity of the offence and the personal circumstances of the offender as they stand at the time of sentence. In fact, we extend this principle even further by accepting that when an appeal court is resentencing a person following the quashing of the original sentence, it should take account of the person's circumstances as they exist when the new sentence is being selected. This means that the mitigating factors recognised by our courts fall into three broad categories:

(1) Factors reducing the gravity of the offence
(2) The offender's response to the offence
(3) Factors which are not directly connected with the gravity of the offence but which are accepted as justifying some leniency at sentencing.

Factors reducing the gravity of the offence

Offence gravity has two elements: harm and culpability. Mitigating factors under this heading would generally be connected with culpability rather than harm. They would include provocation, duress, self-defence, youth, mental illness and intellectual disability (assuming that none of these was sufficient to remove criminal liability altogether).

The offender's response to the offence

Here we are concerned with matters such as the plea entered by the offender, the timing and circumstances of that plea, and the degree and nature of any co-operation given to the police (which can often be an important factor in drug sentencing in particular).

Other factors pointing towards leniency of sentence

This is the most open-ended category and, at times, the most contentious. Certain factors such as absence of previous convictions, old age, illness and disability are well accepted. But there is less agreement about whether, for example, a victim's plea for leniency should have any effect or whether account should be taken of the fact that the offender is the sole or primary carer of young children.

[22] Duff, *Punishment, Communication and Community* (Oxford: Oxford University Press, 2001), pp. 120-121.

Sometimes, of course, the best mitigation comes from the prosecution or from other state actors, notably the probation service. Factors which sentencers often take into account include whether the offender was co-operative with the police investigation, whether he or she has a supportive family and, crucially, whether he or she is at risk of re-offending. Evidence on these, although, of course, led by the defence, will most likely come from the State. Let us consider, by way of example, the recent judgment of the Court of Criminal Appeal in *People (DPP) v Jervis* [2014] IECCA 14 which involved a s. 15A drug offence. The defendants were a couple who pleaded guilty to possessing cannabis estimated to be worth up to a half-million Euro in their house. They were storing it in return for a payment which they expected to be of the order of €200 to €300. When it came to considering their personal circumstances for the purpose of sentence, there was evidence from the Gardaí that the couple's children were well cared for and that the house was maintained in a clean condition. A member of the Gardaí assessed Mr Jervis as being at a medium to low risk of re-offending while the probation officer assessed him as being in the moderate risk category as far as re-offending was concerned. However these assessments were made is left unrecorded.

Enough has been said to show that mitigation can be quite a complex matter. There can often be a very fine line between mitigation and mercy. For instance, in the most recent judgment of the English Court of Appeal on the vexed question of how, or to what extent, sentence should be influenced by evidence that the offender is the sole primary carer of young children, the court held that counsel for the appellant was correct in putting forward her plea as one for mercy.[23] However, it is safe to assume that the present provisions in the Guidelines for Prosecutors reflect fairly well the duties of prosecutors as far as challenging mitigation is concerned.

CONCLUSION

Just by coincidence, in January 2014 (some weeks before the Court of Criminal Appeal decided *Fitzgibbon, Ryan* and *Z*), the High Court of Australia gave judgment in *R v Barbaro.*[24] The applicants in that case had been given heavy prison sentences for serious drug offences by a court in Victoria. Their appeal, which ultimately reached the High Court of Australia, was based on the argument that the trial judge had wrongly refused to hear submissions from the prosecution as to the range of sentences that should be imposed. The practice of hearing such submissions dated back to a decision of the Victoria Court of Appeal in *R v McNeil-Brown*[25] where it had been held that "the making of submissions on sentencing range is an aspect of the duty of the prosecutor to assist the court." The High Court of Australia rejected the appeal holding that the it was not the role of the prosecutor to act as "surrogate judge" but rather (para. 39) "to draw to the attention of the judge what are submitted to be the facts that should be found, the relevant principles

[23] *R v Petherick* [2013] 1 W.L.R. 1102.

[24] [2014] HCA 2, (2014) 88 A.J.L.R. 372.

[25] [2008] VSCA 190

that should be applied, and what has been done in other… comparable cases." It said that a bare statement on the appropriate sentencing range was no more than a statement of opinion and not a legal submission. (One member of the High Court dissented on this point, though not on the final result).

It is telling, however, that the decision in *Barbaro* was not universally welcomed by criminal lawyers throughout Australia. The Bar Association of New South Wales wrote to the Attorneys General of the Commonwealth and of New South Wales criticising the High Court decision and recommending a statutory amendment that would allow both prosecution and defence to make submissions as to the penalty to be imposed in a given case. The reason for their disquiet is that the *Barbaro* decision "will preclude the encouragement of guilty pleas which might result from plea negotiations where the prosecutor agrees to make a submission on a specified sentencing range."[26] What this suggests is that there had been some American-style plea-bargaining in operation under which a deal of sorts would be negotiated in advance of trial or sentencing hearing between defence and prosecution as the sentence that would be suggested. If courts tended to impose a sentence in the range suggested by the prosecution, then they were to some extent delegating their decision-making role to the parties.

Plea bargaining, in that sense at least, is not part of our system and most of us would like to keep it that way. In *People (DPP) v Heeney*[27] the Supreme Court (Keane C.J.) quoted from Lord Scarman's judgment in *R v Atkinson*[28] where he had said that plea bargaining has no place in English law, and Keane C.J. went on to say:

> "In my view that is also the law in this jurisdiction, reinforced as it is by the constitutional considerations to which I have referred."

(The constitutional issue to which he had earlier referred was the requirement in Art. 34.1 that justice be administered in public).

A practice whereby the prosecution routinely to recommend a sentence or a sentence range to the judge might well lead to the kind of plea bargaining system of which both the Supreme Court and the English Court of Appeal clearly disapproved. The central message, however, that we can take from the Court of Criminal Appeal decisions in *Z* and *Fitzgibbon (No.2)* is that the role of the prosecution is to offer assistance rather than guidance. The precise kind of assistance that can or should be offered will doubtless be further specified in future case law.

Finally, it worth making a brief mention of the role of the defence. The Court in *Fitzgibbon* did say that a judge may always ask the defence for submissions as to where on the spectrum of gravity the offence lies, and that the defence may challenge

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[26] Anniwell, "Submissions on sentencing ranges" *New South Wales Bar News*, Winter 2014, p. 15.

[27] [2001] 1 I.R. 736.

[28] (1978) 67 Cr. App. R. 200 at 202.

prosecution submissions in that regard. There is however an argument to be made for imposing a stronger duty on defence lawyers to draw to the court's attention any legal rules or principles that may be in ease of their clients. For instance, the Criminal Justice (Community Service) (Amendment) Act 2011 provides that a judge who is considering imposing a prison sentence of less than 12 months should consider imposing a community service order instead. Recently, there have been some judicial review applications challenging District Court convictions and sentences on the ground that the judge did not expressly mention the possibility of community service. Sometimes, there is no evidence that defence lawyers actually drew the judge's attention to the terms of the 2011 Act. It seems wrong that a party can neglect or omit to draw the court's attention to a statutory provision that might operate in its favour, and then challenge the court's decision for not applying it. It is implicit in the recent decision by the President of the High Court in *O'Brien v Coughlan*[29] that relief should not be granted where there has been such an omission by a defence lawyer. English and Northern Ireland courts have said so more directly. In *R v Cain*, the English Court of Appeal said:

> "It is the duty of the judge to impose a lawful sentence, but sentencing has become a complex matter and a judge often not see the papers very long before the hearing and does not have the time for preparation that advocates should enjoy. In these circumstances a judge relies on the advocates to assist him with sentencing. It is unacceptable for advocates not to ascertain and be prepared to assist the judge with legal restrictions on the sentence that he can impose on their client….."[30]

The court then proceeded to deal with the duties of the prosecution. Overall, therefore, we are entering an era where sentencing at trial court level must be become more "legalised" in the sense that lawyers for both sides must be prepared to deal with legal issues as well as the facts.

[29] [2014] IEHC 425.

[30] [2007] 2 Cr. App. R.(S.) 135.